No. 2671

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN E. MANDERS, as trustee in bankruptcy of the estates of Peterson & Wilson, a partnership, and G. Hazelton Wilson and George Peterson, individuals, bankrupts,
Appellant,

vs.

GEORGE H. WILSON and ELLA H. WILSON (his wife),
Appellees.

BRIEF FOR APPELLEES.

HAROLD L. LEVIN,
H. I. STAFFORD,
Attorneys for Appellees.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of the Case.

Appellants have appealed from the judgment of the District Court for the Northern District of California sustaining a demurrer to the appellant's complaint and dismissing an action brought by the appellant, as trustee in bankruptcy, for the purpose of setting aside a certain transfer of real property, under the Bankruptcy Act.

The undisputed facts of the case are as follows:

That on the 27th day of September, 1911, the bankrupt, G. Hazelton Wilson was the owner of a certain lot of land and was in the actual possession of, the said real property, which was located in Oakland, California.

That on the said 27th day of September, 1911, the said G. Hazelton Wilson, for a valuable consideration, conveyed the said land by a deed, properly acknowledged before a notary, to George H. Wilson and Ella H. Wilson, his wife, the appellees in the case at bar.

That the appellees did not record the deed until the 23rd day of October, 1914, and within four (4) months from the date of the adjudication of bankruptcy of G. Hazelton Wilson, which order of adjudication was made on the 26th day of January, 1915.

That the complaint of the appellant fails to allege that at the time of the delivery or making the aforementioned conveyance, there was any fraud or that the appellees (the grantees) had knowledge or cause to believe that their grantor, G. Hazelton Wilson, bankrupt, was insolvent, or at the time of the conveyance or delivery of the deed, the appellees (grantees) had knowledge of the alleged fraud or in anywise contributed to the alleged fraud; in other words there is nothing in the complaint of appellant to show that in its inception and at the time of making and delivery of the

deed, the appellees (grantees) had notice of intended fraud or in anywise contributed to it.

The sole question in case at bar is: Does a deed, properly acknowledged before a notary public, made, executed and delivered for a valuable consideration, prior to the four months' period of time of the adjudication of the grantor in bankruptcy, become void as to creditors of the bankrupt, if it is not recorded by grantee until within the four months' period? Appellees contend that deed does not become void for the creditors (Trustee in Bankruptcy); has no better rights than the debtor (grantor) but merely stands in the shoes of the debtor (grantor).

Brief of Argument.

POINTS AND AUTHORITIES IN SUPPORT OF APPELLEES' CONTENTIONS.

I.

That the grantors (trustee in bankruptcy) under the California law have no greater rights than their debtor and a deed, although delivered and unrecorded is as good to everyone, except bona fide purchasers for value and without notice.

Section 1214 Civil Code of the State of California;
Prow v. Rose, 4 Cal. 173;
Pixley v. Higgins, 15 Cal. 127.

In further support of the above, we respectfully call the Court's attention to the case of Carey v.

Donohue, decided by the *Supreme Court of the United States on the 13th day of March, 1916,* and reported in the United States Supreme Court Advance Opinions, 1915, in Volume Ten (10), page 386, which case is practically on all fours with the case at bar and involving the same subject matter.

We therefore respectfully deal at length and quote from the said case:

Mr. Justice Hughes delivering the opinion of the Court says:

> *"The sole question presented for the consideration of this Court is whether the deed, executed by the bankrupt, was one which was required to be recorded within the meaning of this section, if it was not there could be no recovery of the property under section Sixty (60) of the bankruptcy act as the deed was executed and delivered more than four (4) months before the petition in bankruptcy was filed.* If the deed was required to be recorded in the sense of the statute, it is clear that the trustee was entitled to recover as the recording was within the four (4) months period and the other condition of recovery were satisfied."

The provisions for the recording of the deed is found in Section 8543 of the General Code of Ohio, which section is as follows:

> "All other deeds and instruments in writing for the conveyance or encumbrance of lands, tenements, or hereditaments executed agreeably to the provisions of this chapter, shall be recorded in the office of the county in which the premises are situated and until so recorded or filed for record shall be deemed fraudulent so far as relates to a specific bona fide purchaser

having at the time of the purchase no knowledge of the existence of such former deed or instrument."

* * * * * * * *

"This provision of the statute must be accepted as exclusively defining the consequences which follow a failure to file a deed for record and there being mere neglect unaccompanied by any fraudulent conduct or representation on the part of the grantee no right can accrue to anyone other than such bona fide purchasers."

Accordingly it was held *that the mere failure to record a deed did not render it invalid as to the creditors of the grantor although it became such on the faith of his representation.*

See decisions cited in the case.

Under these decisions then we assume that there was no requirement that this conveyance should be recorded in order to give it validity as against any creditor of the bankrupt whether a general creditor or a lien creditor or a judgment creditor with execution open and unsatisfied, that is, as against any class of persons represented by the trustee or they whose rights, remedies and powers he may be deemed to be invested.

Bankruptcy Act, Section 47a.

In reading of the above case it is plainly manifest that the Ohio section hereinbefore referred to is substantially

that of the California section, to wit, Section 1214 which is as follows, to wit:

> "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

The appellees will not further burden the Court by attempting to differentiate or distinguish the case cited by the appellant but will suffice it to say that counsel for the appellees concede the cases cited by the appellant to be the law *but they are not applicable to the case at bar.*

In conclusion the appellees desire to call the Court's attention to the following:

I.

(a) In a pleading, attacking a conveyance as fraudulent towards grantor's creditors, it is not sufficient to allege the fraud in general terms but the facts constituting fraud must be stated.

Hiller v. Dyerville Mfg. Co., 116 Cal. 134;
Cosgrove v. Fisk, 90 Cal. 75;
Kinder v. Macy, 7 Cal. 206.

(b) The fact that the deed was made by a father to a daughter without consideration does not of itself raise a presumption of fraud.

Smith v. Mason, 122 Cal. 426.

(c) The complaint alleges a consideration for a conveyance therefor if there is a valuable consideration for the conveyance knowledge of fraud and intent of grantee is immaterial.

Roos v. Wellman, 102 Cal. 1.

(d) *A transfer by insolvent debtor cannot be vacated because of fraud of seller in which the purchaser had no part and of which he had no notice.*

Grunsky v. Parlin, 110 Cal. 179.

(e) The complaint does not in anywise show that the alleged false representations of grantor were made with intent to defraud his creditors, or that the said conveyance was at the time of its delivery, made with intent to defraud creditors.

FRAUDULENT INTENT IS A FACT WHICH MUST BE ALLEGED OR COMPLAINT IS DEMURRABLE.

Vance Estate, 141 Cal. 627;
Fenny v. Howard, 79 Cal. 525;
Colorado Springs v. Wright, 96 Pac. 206.

To constitute a transfer of property fraudulent in fact as against creditors it must be made with the intent on the part of debtor to defraud, delay and hinder creditors.

Bull v. Bray, 89 Cal. 286;
Windhaus v. Booth, 92 Cal. 617.

Conclusion.

We therefore respectfully submit in view of the foregoing that the judgment of the District Judge should be sustained and that the appellees should be awarded their costs upon this appeal.

Dated, San Francisco,
May 15, 1916.

HAROLD L. LEVIN,
H. I. STAFFORD,
Attorneys for Appellees.